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Supreme Court, U.S.
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NO. 94-375

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CITY OF CABOOL, MISSOURI,
JAY GENTRY AND JERRY ROBERTS,

Petitioners,

v.

JOHN C. CASEY,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For the Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Was the discharge of a police dispatcher (who earlier had resigned as fire chief and agreed to stay out of fire department operations, but who continued to disrupt the Fire Department, and confronted the City Administrator with false allegations of dishonesty against the City Clerk and Mayor in an attempt to coerce the City to allow the dispatcher to set fire department policies) for insubordination, breach of his agreement, breach of the chain of command, and disruption, a violation of the dispatcher's First Amendment free speech rights and actionable under 42 U.S.C. § 1983? And did the federal courts below, under Connick v. Myers, and Waters v. Churchill, fail to defer to the local government officials?

II. Is a conversation to be divided into "public concern" and "private concern" categories, or must it be considered as a whole to be either "public concern" or "private concern," an issue on which there is an acknowledged split among the Circuit Courts as recognized in Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 147 (2d Cir. 1993)?

III. Did the Eighth Circuit below err in failing to consider, and find, under University of Tennessee v. Elliott, that the discharge appeal hearing decision, in which the dispatcher's free speech challenges were denied, constituted a final decision, when not appealed under the Missouri Administrative Procedure Act (RSMo. §§ 536.010 et seq.), and that such decision cannot be collaterally attached under 42 U.S.C. § 1983?

IV. Where the dispatcher sued for $200,000.00 and received a jury verdict and judgment for only $18,888.00 (less than 10% of the amount claimed), did the federal courts below err, under Farrar v. Hobby, in awarding more than $80,000.00 in attorneys' fees?

TABLE OF CONTENTS

Page No.

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES 6

STATEMENT OF THE CASE 1

ARGUMENT 16

I.

Petitioners' discharge of Casey, a police/fire dispatcher, solely for having privately on one occassion expressed his opinion on matters of public concern was in clear derogation of his First Amendment rights. 16

II.

Even assuming a split in the Circuits as to whether a conversation must in whole or may in part be of public concern; that question is not germane here, since Petitioners judicially admitted the entire conversation was of public concern . 24

III

City's post-discharge "hearing" did not constitute a contested case under Missouri Administrative Procedure Act (RSMo. §§ 536.010 et seq. and any determination therein made does not constitute res adjudicata or collateral estoppel; thereby preventing a subsequent 42 U.S.C. § 1983 federal court proceeding 27

IV

The Trial Court and Appellate Court fee awards were wholly consistent with Farrar v. Hobby, 506 U.S. ____, 121 L.Ed.2d 494 (1992) and all earlier case law . . . 37

TABLE OF AUTHORITIES

Cases

	Page No.
Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. _____, 115 L. Ed. 2d 96 (1991).	33
City of Riverside v. Rivera, 477 U.S. 561 (1986).	39,40,41
Connick v. Myers, 461 U.S. 138 (1983)	18
Coop v. City of South Bend, 635 F.2d 652 (7th Cir. 1980)	42
Farrar v. Hobby, 506 U.S. ____, 121 L.Ed.2d 494 (1992)	37,38,39
Franklin v. Board of Directors, School District of Kansas City, 772 S.W.2d 873 (Mo.App. 1989) .	31,32,33
Geimer v. Pastrovich, 946 F.2d 1379 (8th Cir. 1991)	27
Germann v. City of Kansas City, 776 F.2d 761 (8th Cir. 1985)	20
Hagely v. Board of Education of the Webster Groves School District, 841 S.W.2d 663 (Mo. banc 1992).	30,36

Kelley v. Johnson, 425 U.S. 238 (1976) 20,21

Kish v. Chilhowee R-IV School Dist., 814 S.W.2d 649 (Mo.App. 1991) 32,33

Konczak v. Tyrrell, 603 F.2d 13 (7th Cir. 1979) 42

New York Times Co. v. Sullivan, 376 U.S. 254 (1964). 45

O'Brien v. City of Greers Ferry, 873 F.2d 1115 (8th Cir. 1989). . . . 37

Paxton v. Union National Bank, 806 F.2d 785 (8th Cir. 1986) 43

Pickering v. Board of Education, 391 U.S. 563 (1968) 17,18,19

Population Services International v. Carey, 476 F.Supp. 4 (S.D.N.Y. 1979). 42,43

Rankin v. McPherson, 483 U.S. 378 (1987). 18,19,24,45

Ross v. Jones, 888 F.2d 548 (8th Cir. 1989) 27

Saulpaugh v. Monroe Community Hosp., 4 F.3d 134 (2d Cir. 1993) 25

Shakey's Inc. v. Covalt, 704 F.2d 426 (9th Cir. 1983) 42

University of Tennessee v. Elliott, 478 U.S. 788 (1986) 33,36

Waters v. Churchill, 511 U.S. ___, 128 L.Ed.2d 686 (1994) 21,22

Williams v. Alioto, 625 F.2d 845 (9th Cir. 1980) 42

Statutes

Missouri Administrative Procedure Act, RSMo. §§ 536.010, et seq. . . . . passim

STATEMENT OF THE CASE

Petitioners' Statement of The Case (Pet. 1-11) does not fairly present the evidence at trial. The evidence supporting the jury's verdict in favor of Respondent John C. Casey ("Casey") is as follows.

Casey resided five miles outside the limits of Cabool, Missouri ("City")(I/72), although he owned 11 parcels of real estate around and in City (I/25; II/87; III/27) and paid taxes to City, as well. (III/27-28.) He began working for City as a police/fire dispatcher in July, 1981 (I/72), was the City's only full-time dispatcher in May, 1990 (I/73), and had been City's chief dispatcher since July, 1981. (I/74.) As dispatcher, Casey had no policy making authority and made no policy decisions for City. (I/112-13.)

His job was merely to answer the telephone calls from the public and to dispatch the appropriate police/fire personnel. (I/113.)

On May 3, 1990, prior to his work shift commencing at 5:00 p.m. (I/75), Casey went at 4:40 p.m. to speak privately with the City's full-time administrator Michael MacPherson ("MacPherson") in MacPherson's office at City Hall. (I/75-76.) MacPherson's door was open, Casey knocked, and MacPherson motioned him in. (I/77; II/85-86.) Casey's prior contact with MacPherson had been minimal, inasmuch as MacPherson was not his supervisor, and Casey had only spoken with him twice before during the year MacPherson had been working for the City. (I/88.) Casey told MacPherson of his concerns and disagreement with the City's policy of raising rural fire fees (I/77; II/5) and

he opined that such fees could not lawfully be raised without voter approval. (I/79.) Casey expressed his further concern that such change might adversely affect the Insurance Service Organization ("ISO") fire ratings for the area and increase insurance premiums for area residents. (I/82.) Casey also voiced concern over the City's policy of not permitting the newest and lead fire truck to go outside the City limits and that particular policy's impact, as well, upon the ISO ratings and insurance premiums. (I/83-84.)

When the 5:00 p.m. work whistle blew, Casey indicated to MacPherson that he needed to report to work at the police/fire department across the street. (I/87-88.) MacPherson indicated they "needed to talk further" and Casey responded he had "said what [he] had to

say." (I/89.) MacPherson again stated "we should talk" and wanted clarification on the ISO issue, to which Casey again responded he needed to report to work. (I/89.) MacPherson said he would come over shortly, Casey left and started his work as dispatcher at the police/fire station, and in a few minutes MacPherson joined Casey at his dispatching office. (I/90-91; II/89.) At Casey's desk, they again went over the ISO procedures, the raising of rural fire fees, and the lead fire truck issue. (I/91-92.) Casey raised the possibility that someone might contact the Missouri State Auditor Margaret Kelly ("Kelly"), relative to the rural fire fee issue and the application of those fees (I/92); and Casey suggested that MacPherson contact Kelly's office to get an opinion as to whether a public vote was required to raise the fees. (I/93.)

Casey did not think the City needed the publicity Kelly would bring. (II/9.) MacPherson replied that he was not bound by what any prior Mayor or City Council may have done. (I/94.) Casey indicated they wouldn't want Kelly to investigate, because she seemed to find something wrong wherever she went (I/94) and that Kelly might learn of City employees having worked at the City Clerk's (Billie Stewart) home. (II/17.)

Casey related to MacPherson a single incident in 1988 or 1989 when the Clerk had requested City employees to fix a sewer problem on her private property. Casey, as dispatcher, had requested a municipal employee to report to her home on a Sunday and had broadcast a request to a neighboring community for additional sewer equipment. (I/95-98.) Casey had been concerned because all dispatching is

done over the public airwaves (I/97; IV/85, 87) and many local citizens monitored the dispatching calls in their homes. (III/20-21.) Casey's contact with the Clerk was very limited, inasmuch as she had nothing to do with the police/fire departments or his dispatching function, and they were officed in different buildings across the street from one another. (I/88-89; III/6-7.) The following day, Monday, and in the event anyone had heard the broadcasts and inquired about them, Casey informed Mayor Hardy (I/102; III/107; 112-14) and the Mayor indicated to Casey that the Clerk would be retiring in October. (I/102.) The Mayor never spoke to the Clerk about Casey talking to him. (III/108.) The Clerk had no knowledge of Casey's statements until MacPherson told her and

she personally then told other City employees. (II/277-78, 284; III/9.)

MacPherson asked Casey of any reason why the Clerk might dislike him and Casey told MacPherson of a single incident in 1982, some eight years earlier, when the Clerk's son Brian Stewart had reported to a fire as a volunteer fireman, having previously been drinking. (I/100-01.) Nevertheless, MacPherson reported to the Clerk that Casey had said Brian always came drunk to fires. (III/13.) Casey had not mentioned this one occasion to anyone but MacPherson. (III/28-29.) The conversation between Casey and MacPherson at the police/fire station was over by 5:20 p.m. (I/104.)

Casey's and MacPherson's conversations, both at City Hall in MacPherson's office and at the police/fire station in Casey's office, were private;

no one else overheard the actual conversations; and they did not interfere in any manner with Casey's dispatching duties. (I/104-05.) MacPherson told Casey that they should have had the conversation sooner and they never spoke to each other about it again. (I/106-07.) Casey shared the conversation with no one. (I/107.) The conversations were conducted in civil tones, there was no raising of voices (I/112; II/88, 90-91) and MacPherson never indicated that he believed the discussions were inappropriate, that any of Casey's statements were untrue, that any discomfort by MacPherson occurred, or that MacPherson objected to anything Casey was saying. (I/103.)

MacPherson related the entire conversation to Mayor Hardy and to the City Clerk. (III/214.) An executive

session of the City Council was held on Monday evening, May 7, 1990, during which MacPherson repeated his conversations with Casey to the City Council. On the recommendation of MacPherson, the City Council voted two-to-one to terminate Casey, with Petitioners Gentry and Roberts voting in favor. (II/108.) MacPherson believed the timing and location of the conversations were not relevant. (II/92-93.) MacPherson believed it was disloyal of Casey as a City employee to make these statements. (II/92.) MacPherson stated that Casey had no right as a City employee to question City Council policy and to do so was unacceptable, insubordinate and disloyal. (II/96.)

On Tuesday morning, May 8, 1990, Casey was handed by his supervisor (I/88), Police Chief Jones ("Chief"), a letter from MacPherson informing him that he had

been terminated by the Council the previous evening. (I/108-09.) At the time of his discharge, Casey was earning $6.92 per hour ($1,200.00 monthly), plus medical insurance benefits of $247.00 per month, plus a pension fund contribution of 13%. (I/111.) At trial, Casey testified that despite efforts, he had been unable to find comparable employment and did not anticipate being able to do so during the coming year. (I/111.)

While conceding that the meeting of Monday, May 7, 1990, to discuss terminating Casey would never had occurred but for his conversation with MacPherson on Thursday, May 3, 1990, (III/38, 151; IV/115), the City pretexually alleged that Casey was fired instead for unrelated past misconduct.

Petitioner Gentry acknowledged that at the May 7, 1990, meeting there was no criticism of Casey's job performance as dispatcher (II/101-03) and that none of Casey's activities with the fire department were a consideration in his discharge. (II/102.) Gentry stated that MacPherson considered Casey to have been grossly insubordinate and recommended his termination. (II/104-05.) The sole reason Gentry voted to terminate Casey was his conversation with MacPherson a few days earlier. (II/109.) Gentry considered the conversation to have been an act of disloyalty by Casey as a City employee; it was a breach of his allegiance to the City. (II/113.) Gentry believed Casey had been disloyal by being insubordinate and he had been insubordinate by being disloyal. (II/118.)

Petitioner Roberts confirmed that Casey's role in the fire department played no role in his discharge. (II/122.) The termination was based on MacPherson's recommendation by reason of Casey's insubordination in his conversation with MacPherson a few days earlier. (III/124.) Roberts was unable to state that any past acts of Casey played any part in his vote to fire him (II/130); he merely felt that Casey was disloyal by criticizing another City employee. (II/133-34; III/156.)

The meeting of May 7, 1990, was the first time the Council had ever met in executive session to terminate an employee (II/103, 131) and the Council had not been previously advised by MacPherson of the meeting's purpose. (II/104, 123; III/187.) Casey was never advised of the Council's intent to meet and to discuss

him. (II/84.) The sole purpose of the meeting was to discuss firing Casey. (II/104.) No one ever considered interviewing or hearing from Casey about his conversation with MacPherson. (II/105-06, 128; III/49-50, 155, 191.) Casey's personnel file was not reviewed nor was a job performance evaluation sought from his supervisor, Police Chief Jones. (II/109, 122, 129.) No one at the meeting ever considered Casey's rights of free expression. (III/51, 155, 192.)

Police Chief Jones testified that everyone has a right to express differences of opinion with City policy and it is a right you don't surrender just because you're a City employee. (II/174-75, 181.) The Chief did not believe it constituted disloyalty for an employee to express such opinions. (II/181.) As Police Chief Jones testified, Casey's

"opinions never interfered with his work performance." (II/180.)

During Casey's nine years as City's dispatcher, no elected or appointed official of the City had ever criticized his job performance and, in fact, MacPherson had commended him on his role as dispatcher, as had his direct supervisor Chief Jones. (I/85; II/151.) Casey was as good a dispatcher as Chief Jones had ever had and no one ever sought out his opinion of Casey before the May 7, 1990, meeting. (II/139, 162.) Casey had never refused to obey, and had never disobeyed, a directive of Police Chief Jones. (II/199.)

The meeting of May 7, 1990, would never have been held, but for Casey's and MacPherson's conversation. (III/38, 151; IV/115.) The conversation topics of Auditor Kelly, City employees working on

officials' homes, an intoxicated firefighter, and improper fire fees, in the opinion of both the City's Clerk and City's Mayor Hardy, would all be matters of public concern and interest. (III/45-48, 119-20.) No part of the conversation was merely a private matter or only of concern to Casey. (III/121.) According to Mayor Hardy, the conversation was the important factor and without the conversation there would have been no reason to fire Casey on May 7, 1990. (III/114-15; see Petitioner Roberts at III/195.)

ARGUMENT

QUESTION I

I. Petitioners' discharge of Casey, a police/fire dispatcher, solely for having privately on one occassion expressed his opinion on matters of public concern was in clear derogation of his First Amendment rights.

As framed by Petitioners, Question I is heavily fact laden and requires this Honorable Court to disregard the jury's findings, to accept all of Petitioners' evidence as true, to disregard all of Respondent's evidence, to ignore complete the jury's verdict and lower court rulings, and to retry this entire cause upon the cold transcript. Accepting Respondent's evidence as credible, as the

jury and lower courts did, the applicable law fully supports the judgments below in Respondent's favor.

A. The trial court correctly and properly applied the Pickering *balance to the facts of this case.*

This Honorable Court in Pickering v. Board of Education, 391 U.S. 563 (1968) did not attempt to establish a general standard against which all public employees' statements might be judged. Rather, it recognized that, when evaluating the speech of a public employee, a balancing is needed:

> The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Id., at 568. The Trial Court carefully and properly applied this balancing test in finding all of Casey's statements to MacPherson to be protected under the First Amendment.

The issue of whether Casey's statements constituted speech on matters of public concern, is a question of law to be determined by the trial court. Connick v. Myers, 461 U.S. 138, 148 n.7, 150 n.10 (1983). This determination is made by examining "the content, form, and context of a given statement, as revealed by the whole record." Id., at 147-48.

It is clear that MacPherson was offended by Casey's statements. This fact does not bolster Petitioners' argument, however.

> The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.

> '[D]ebate on public issues should be uninhibited, robust, and wide open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' New York Times Co. v. Sullivan, 376 U.S.254, 270 (1964).

Rankin v. McPherson, 483 U.S. 378, 387 (1987).

Once the Trial Court determined that Casey's speech dealt with matters of public concern (as both Petitioners' own witnesses, its City's Mayor and City Clerk, conceded at trial [III/45-48, 119-20]), it was obligated to balance Casey's interest in making the statements against the interest of the City, as an employer, in promoting the efficiency of the public services it performs through its employees. The Eighth Circuit has set forth six factors to be considered when applying the Pickering balance:

> (1) the need for harmony in the office or work place; (2) whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or could cause the relationship to deteriorate; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties.

Germann v. City of Kansas City, 776 F.2d 761, 764 (8th Cir. 1985). Each of these factors was supported by substantial and credible evidence in favor of Respondent.

Ignoring Petitioners' total and unfair distortion of the facts so that the law may seemingly apply to them, Petitioners make but two points in their Question I. First, citing Kelley v. Johnson, 425 U.S. 238, 246-47 (1976) and subsequent Circuit court cases citing Kelley, Petitioners argue for special

consideration in light of Respondent's position as an employee of City's police/fire department. Petitioners are unusually silent when it comes to remembering that Casey was not a police officer nor a firefighter, but merely a radio dispatcher. Kelley and its progeny were not intended to include mechanics, custodians, dispatchers and every employee of a police/fire department, but only those in uniform who perform their duties under quasi-military protocols. Petitioners' argument in this regard was noted and rejected by every lower court decision in this case.

Secondly, Petitioners raise for the first time, Waters v. Churchill, 511 U.S. __, 128 L.Ed.2d 686 (May 31, 1994), which had not been decided as of the Eighth Circuit opinion on December 28, 1993, or as of its second denial of rehearing by

the panel or en banc on May 13, 1994. Waters, supra, is markedly different than the instant case. In Waters, the employee made disparaging comments about her direct supervisor (Ibid.), had received prior bad reviews in her current position (Id. at 693), and had personally been interviewed prior to her discharge (Id. at 702); none of which facts occurred here. As noted by this Honorable Court in Waters:

> [G]overnment must bear burden of proving that speech is unprotected.

Waters, supra, 128 L.Ed.2d at 695.

> [Where] a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected, the manager must tread with a certain amount of care.

Id., 128 L.Ed.2d at 702.

Here, the uncontradicted admissions against interest made by Petitioners and their agents at trial resolve all essential fact questions in favor of Respondent.

(a) The conversation was private and overheard by no one. (I/104-05.)

(b) Casey's conversation was not with his direct supervisor or someone with whom he had any regular contact. (I/88.)

(c) The conversation was encouraged, and never discouraged by the City Manager, MacPherson. (I/88-89, 90-91, 103, 106-07, 112.)

(d) Casey's termination was solely on the basis of Petitioners' belief that Respondent had no right to question City policy and do so was unacceptable, insubordinate and disloyal. (II/92, 96, 113, 118, 133-34; III/156.)

(e) Casey's job performance was exemplary (I/85; II/139, 151, 162, 199) and his prior work record with the City was not a factor in his discharge. (II/102, 122, 130.)

(f) Casey was terminated without ever having been spoken to nor were Casey's rights of free expression ever considered by Petitioners. (III/51, 155, 192.)

(g) Both the City's Clerk and Mayor believed all topics of the Casey's conversation with MacPherson were matters of general public concern and interest. (III/45-48, 119-21.)

(h) Casey was fired solely for his conversation with MacPherson.

(III/38, 114-15, 151, 195; IV/115.)

There is no evidence whatsoever that Casey's opinions which he expressed to MacPherson interfered with his job performance. In fact, Chief Jones flatly testified that they did not. (II/180.) Neither did Casey's comments demonstrate a character trait that made him unfit to perform his work. Rankin, supra, at 389.

QUESTION II

II. Even assuming a split in the Circuits as to whether a conversation must in whole or may in part be of public concern; that question is not germane here, since Petitioners judicially admitted the entire conversation was of public concern.

a. Petitioners' attempt to interject an issue claimed to have been resolved differently among the Circuits in an effort to pique this Honorable Court's interest under Supreme Court Rule 10.1(a). Regardless of the existence of any such diversity of views as to "whether the speech of a public employee must be placed in either the 'public concern' or the 'personal interest' categories, or whether, in an appropriate case, it may be placed in both categories," this is not the "appropriate case." Saulpaugh v. Monroe Community Hospital, 4 F.2d 134, 147 (2nd Cir. 1993). Both the Trial Court and the Appellate Court found the entire conversation to have been of public concern, as did Petitioners' own witnesses, the City Mayor and its City Clerk. (III/45-48, 119-121.)

b. The Trial Court correctly refused Petitioners' tendered instructions FF, GG and HH. (App. Apx. 186-88.) Each of the three tendered instructions included the defense that Petitioners would have discharged Casey in the absence of his protected speech. The Trial Court's instruction number 7 fairly submitted this defense to the jury. (Apx. 168.) Instructions FF, GG and HH would have been unnecessarily cumulative on this point.

Each of the three tendered instructions also submitted that Casey, as a matter of law, had made recklessly false statements. Because the Trial Court correctly ruled that Casey's speech was protected speech, the Trial Court properly refused the instructions tendered by Petitioners.

"Instructions are committed to the discretion of the district court" (Geimer v. Pastrovich, 946 F.2d 1379, 1382 (8th Cir. 1991)) and an "error in instructing the jury in a civil case does not require reversal if it is more probably than not harmless." Ross v. Jones, 888 F.2d 548, 550 (8th Cir. 1989).

QUESTION III

III. City's post-discharge "hearing" did not constitute a contested case under Missouri Administrative Procedure Act (RSMo. §§ 536.010 et seq. and any determination therein made does not constitute res adjudicata or collateral estoppel; thereby preventing a subsequent 42 U.S.C. § 1983 federal court proceeding.

Petitioners awkwardly attempt, in vain, to construe the post-discharge hearing held by City as a "contested case" within the meaning of Missouri's

Administrative Procedure Act ("Act"). (R.S.Mo., §536.010, et seq.) Because City's hearing was not a contested case, there can be no resulting res judicata (claim preclusion) or collateral estoppel (issue preclusion).

The Act defines a "contested case" as a "proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." R.S.Mo., §536.010(2). The Missouri Supreme Court has construed this definition to mean:

> The [Act] defines a 'contested case' as 'a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.' § 536.010(2). This Court has explained that a '"contested case" within the meaning of the Act does not mean every case in which there may be a contest about "rights, duties or privileges" but instead one in which the contest is required by

law to be decided in a hearing before an administrative agency.'

. . . .

In a contested case, the agency must provide notice to all necessary parties. §536.067. At the hearing, oral evidence must be on oath or affirmation; the parties may call and examine witnesses, introduce exhibits, cross-examine opposing witnesses, impeach any witness, and rebut the evidence; a record of the proceedings must be made and preserved; and evidentiary rules must be followed. §536.070. Depositions may be taken, subpoenas may be issued, and briefs may be filed. §§536.073, RSMo Supp.1991; 536.077, 536.080. Decisions must be in writing and must include findings of fact and conclusions of law. §536.090.

A measure of procedural formality is essential to the meaning of 'hearing' as it is used in §536.010. . . . The term 'hearing' presupposes a proceeding before a competent tribunal in which adversarial parties are apprised of all the evidence offered or considered, with the opportunity to test, examine, explain, or refute such evidence, and have the right to present their contentions and to

> support them by proof and argument. 'Thus, there is no "hearing" when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute.'
>
> A hearing that is not held pursuant to the procedural format necessary under [the Act] does not qualify as a contested case, even though the hearing is required by law.

Hagely v. Board of Education of the Webster Groves School District, 841 S.W.2d 663, 667-669 (Mo. banc 1992).

Casey was an employee at will of City. Petitioners do not cite a single law or ordinance requiring any hearing be held before City could discharge Casey.

In this case, a hearing was held only because Casey requested one. It was held only after Petitioners discharged Casey, not before. The purpose of it was "merely to hear John's side of the story, what evidence or whatever he has to present."

(Petn'rs. Ex. 13.) It was held pursuant to 23.150 of the City's code which grants all permanent employees "the right of appeal" within ten days after the effective date of disciplinary action. (Petn'rs. Ex. 27.) The effect of Casey's discharge was not stayed pending the appeal. Because there was no constitutional, statutory or other requirement that Casey's status be decided after the hearing was held, the hearing was not a "contested case."

Petitioners' decision to discharge Casey was a "noncontested case"; that is, an agency determination of the legal rights, duties or privileges of any person rendered without hearing before final decision. Franklin v. Board of Directors, School District of Kansas City, 772 S.W.2d 873, 876 (Mo.App. 1989). Under the Act, noncontested cases may be reviewed by the

circuit court. R.S.Mo., §536.150.1. Such review is not mandatory. Further, subsection 3 expressly provides:

> Nothing in this section shall be construed to . . . limit the jurisdiction of any court or the scope of any remedy available in the absence of this section.

(Emphasis supplied.)

Missouri courts consistently have not given preclusive effect to the type of hearing afforded Casey. In Kish v. Chilhowee R-IV School Dist., 814 S.W.2d 649 (Mo.App. 1991), the Superintendent's employment had been terminated by the school district (an agency under the Administrative Procedure Act), pursuant to a noncontested case. The court held that the agency's decision did not preclude the terminated employee from filing suit in state court for breach of contract. Thus, City's post-discharge rubber-stamping of

its prior decision is not entitled to full faith and credit in federal court and has no preclusive effect here. See University of Tennessee v. Elliott, 478 U.S. 788 (1986); And, Astoria Federal Savings & Loan Ass'n. v. Solimino, 501 U.S. ____, 115 L.Ed.2d 96 (1991).

Petitioners next urge that Casey's action is barred because he did not exhaust his administrative remedies. The Missouri Appellate Court in Kish, supra, made short shrift of that argument:

> We read [§536.150.3] to be a clear legislative directive that, in an uncontested case, the party whose rights have been affected by an agency decision may have the decision reviewed pursuant to § 536.150.1, but the availability of that review does not exclude the circuit court from exercising its original jurisdiction over a civil case for breach of contract.

Id., 814 S.W.2d at 653 (emphasis in original).

The circuity of Petitioners' logic is apparent. Petitioners argue that Casey could not sue in federal court under §1983 because he did not exhaust his administrative remedies. Yet, if Casey had raised his First Amendment claim in state court in a review de novo, then his claim would indeed have been barred by the principles of claim or issue preclusion. Under the Petitioners' theory, no Missouri employee at will whose employment is terminated in violation of federal civil rights law could ever seek a remedy in federal court under §1983.

Even if the City hearing had been a contested case, the City's determination would not serve as a bar to Casey's claims in this case, for two reasons.

First, the Act itself explicitly permits a suit such as this one. R.S.Mo., § 536.100 governs judicial review of

contested cases. It permits judicial review:

> . . . as provided in sections 536.100 to 536.140 unless some other provision for judicial review is provided by statute; provided, however, that nothing in this chapter contained shall prevent any person from attacking any void order of an agency at any time or in any manner that would be proper in the absence of this section.

(Emphasis supplied.) Title 42 U.S.C., §1983 clearly is a statute that grants Casey a cause of action on his claim in this case.

Second, the City hearing did not concern itself with the issue of whether Casey was dismissed for exercising his First Amendment right to free speech. The report written by Alderperson Wells states that Casey was found to have committed acts of serious insubordination in making the statements he made to MacPherson. There was no consideration whatever of

whether Casey's remarks were protected speech. Inconsistent with the prerequisites of Hagely, supra, 841 S.W.2d at 668: The City offered no witnesses, testimony, or evidence of any kind at the hearing; Evidence was not taken on oath; Evidentiary rules were not followed; Casey was not presented with City's evidence nor given the opportunity to confront or rebut it; No discovery procedures nor process was afforded to Casey; And no record of the hearing was made. Because there was no determination made on Casey's First Amendment claim, the City's "hearing" cannot serve as a bar to Casey subsequently raising his claim in federal court.

Petitioners' reliance upon University of Tennessee v. Elliott, 478 U.S. 788 (1986) is misplaced. In Elliott, the prior hearing was before a state

Administrative Law Judge proceeding under the Uniform Administrative Procedure Act, which requires the bare essential of Hagely, supra; none of which were afforded to Casey.

QUESTION IV

The Trial Courot and Appellate Court fee awards were wholly consistent with Farrar v. Hobby, 506 U.S. ____, 121 L.Ed.2d 494 (1992) and all earlier case law.

The appropriate appellate standard of review for an award of attorneys' fees pursuant to 42 U.S.C. §1988 is clear.

> The award of attorney's fees under section 1988 is a matter uniquely for the district court's discretion and will not be overturned absent an abuse of discretion or an error in implementing the governing legal standards.

O'Brien v. City of Greers Ferry, 873 F.2d 1115, 1117 (8th Cir. 1989).

Initially, Petitioners raise the recent ruling by the United States Supreme Court in Farrar v. Hobby, 506 U.S. ____, 121 L.Ed.2d 494 (1992). In must be noted that the Trial Court expressly considered the full implications of Farrar in its award of fees and costs. (Cert. Apx. 60, 67)

Petitioners' reliance on Farrar is misplaced. Farrar expressly and exclusively addressed the issue of granting a fee award under 42 U.S.C. §1988, when plaintiff recovered only a nominal damage award from the Appellate Court, after the jury had originally awarded plaintiff nothing. Farrar, supra, 121 L.Ed.2d at 500. The clear and singular holding of Farrar, supra, is that "the 'technical' nature of a nominal damages award . . . does bear on the propriety of fees awarded under §1988."

Id., at 505. As this Honorable Court noted: "This litigation accomplished little beyond giving petitioners 'the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated' in some unspecified way." Ibid.

Petitioners suggest that this Honorable Court in Farrar has overturned 17 years of case law under 42 U.S.C. §1988, without a dissent or an express discussion or overruling of prior case law.

In Farrar, supra, this Honorable Court relied upon City of Riverside v. Rivera, 477 U.S. 561 (1986). Id., at 505.

> We reject the proposition that fee awards under §1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers . . . Congress has determined that the public as a whole has an interest in the vindication of the rights

> conferred by the statutes enumerated in §1988, over and above the value of a civil rights remedy to a particular plaintiff . . .'

Rivera, supra, 477 U.S. at 574.

> Because damage awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief. . . . '[C]ounsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, "for all time reasonably expended on a matter."'

Id., 477 U.S. at 575 (emphasis in the original).

> A rule that limits attorney's fees in civil rights cases to a proportion of the damages awarded would seriously undermine Congress' purpose in enacting §1988.

Id., 477 U.S. at 576.

> Congress enacted §1988 specifically to enable plaintiffs to enforce the civil rights laws even where the amount of damages at stake would

> not otherwise make it feasible for them to do so . . .

Id., 477 U.S. at 577 (emphasis supplied).

> A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts.

Id., 477 U.S. at 578.

> Furthermore, we have held that a civil rights defendant is not liable for attorney's fees incurred after a pretrial settlement offer, where the judgment recovered by the plaintiff is less than the offer. Marek v. Chesny, 473 U.S. 1 (1985).

Id., 477 U.S. at 580. Here, Petitioners utterly failed to avail themselves of the available options to limit their exposure. See: F.R.C.P. 68.

Lastly, Petitioners maintain they were entitled to a second trial on the issue of fees alone. The courts have traditionally held that fee hearings are

discretionary and are not required, particularly where the "(1) the record contains ample evidence to support the attorney's fee award and (2) the district court's ruling was sufficiently detailed to permit review." Shakey's Inc. v. Covalt, 704 F.2d 426, 435 (9th Cir. 1983). See: Williams v. Alioto, 625 F.2d 845, 849 (9th Cir. 1980); Coop v. City of South Bend, 635 F.2d 652, 655 (7th Cir. 1980)("[defendants'] belief that a hearing was necessary is without foundation since briefing alone has been found adequate"). As in Konczak v. Tyrrell, 603 F.2d 13, 19 (7th Cir. 1979), cert. denied, 444 U.S. 1016 (1980), "[c]onsidering the depth of the briefing, a hearing on the attorney's fees was unnecessary."

> Although defendants request an evidentiary hearing, the Court does not consider such a hearing to be a matter of right.

> Other than the mere assertion in their brief that the rates and hours denominated are excessive, defendants have not supported such assertion with any affidavits, case law or other offer of proof which would put such matters into issue. Conversely, plaintiffs have supported their application with a detailed affidavit . . . setting forth the qualifications and experience of each attorney for whom compensation is sought and a list of other civil rights and civil liberties cases handled by these attorneys; an affidavit of an attorney unrelated to the litigation who attests to the reasonableness of the hours and rates set forth and to the reputation of the attorneys; and a brief setting forth examples of reasonable rates in recent case law. Accordingly, the Court denies defendants' request for an evidentiary hearing.

Population Services International v. Carey, 476 F.Supp. 4, 9-10 (S.D.N.Y. 1979). See: Paxton v. Union National Bank, 806 F.2d 785, 786 (8th Cir. 1986)(denying claim of entitlement of fee hearing).

Putting aside all of Petitioners' carping, the Trial Court thoroughly considered Farrar, supra, and awarded to Respondent less fees than he requested.

CONCLUSION

This nation has long recognized the precept, embodied in the First Amendment, of a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). Casey urges this Honorable Court to heed its prior caution in Rankin, supra, 483 U,S. at 384:

> Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.

This is precisely what the City and its officials attempted to do in this case. It is precisely what the First Amendment prohibits.

The Petition for Writ of Certiorari should be denied in all respects, forthwith.

Respectfully submitted,

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